Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

LEO GREENFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LEO GREENFIELD, Pro Se
1680 N.E. 135th Street
North Miami, FL 33181
(305) 893-9270

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The United States District Court for the Southern District of Florida entered judgment on a jury verdict finding the Petitioner, a lawyer, guilty of violating 18 U.S.C. 1503 and 18 U.S.C. 1957 and the Court of Appeals for the Eleventh Circuit affirmed with a per curiam "Do Not Publish" opinion.

1. Local Rule 16.E. of The United States District Court for the Southern District of Florida is facially unconstitutional as an impermissible prior restraint that abridged the Petitioner's first, fifth and sixth amendment rights and therefore should be declared unconstitutional on its face or unconstitutional as applied to the Petitioner on the facts of this case.

2. The denial of the motions filed pursuant to 28 U.S.C. 292(b) and 28 U.S.C. 455(b)(1) on grounds of prejudice since the prosecution's main witness accused by name several sitting judges and, without designation, generally all the judges of the Southern District of Florida as being in a conspiracy with the Petitioner, and the admission of the Chief Judge's testimony as an expert witness, over objection of the Petitioner, was a violation of the Petitioner's fifth and sixth amendment rights and denied the Petitioner's constitutional right to a fair trial before an impartial judge.

PARTIES PURSUANT TO SUPREME COURT RULE 14.1(b)

The following named parties to the proceeding in the courts whose judgment is sought to be reviewed are:

1. Judge Joseph W. Hatchett, Court of Appeals for the Eleventh Circuit.

2. Judge R. Lanier Anderson III, Court of Appeals for the Eleventh Circuit.

3. Judge George C. Young, Senior United States District Judge for the Middle District of Florida, sitting on the Court of Appeals for the Eleventh Circuit.

4. Judge Lenore Nesbitt, United States District Judge, Southern District of Florida.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, in filing this petition pro se, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on December 17, 1993.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1) is unreported. The judgment of the district court (Pet.App. 2) is unreported.

GROUNDS FOR JURISDICTION

The opinion of the court of appeals was issued on December 17, 1993. The Petitioner did not file a petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1), in that the United States Court of Appeals for the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceeding and/or has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL, STATUTORY AND RULES INVOLVED

U.S. Constitution, first amendment	Pet App. 3
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U.S. Constitution, sixth amendment	Pet. App. 5
Local Rules 16.C. and 16.E., United States District Court for the Southern District of Florida	Pet. App. 6
28 U.S.C. Section 455(b)(1)	Pet. App. 7
28 U.S.C. 292(b)	Pet. App. 8
Fed.R.Evid. 606(b)	Pet. App. 9

STATEMENT OF THE CASE

On March 23, 1989, the Petitioner, a lawyer, was indicted alleging a violation of 18 U.S.C. Section 1503 (obstruction of justice) and 18 U.S.C. Section 1957 (funds

derived from a specified unlawful activity) (Pet.App. 10). The Petitioner, a civil trial lawyer, was alleged to have falsely represented to a longstanding civil client, who had been convicted of bank fraud, income tax evasion, and perjury, that he could accomplish a reduction of the said client's sentence through payment of money to a judicial officer.

The Petitioner denied then and still denies such contention.

Because the substantive charges were alleged to have involved the Chief Judge of the Southern District of Florida, who was to be called as a witness for the prosecution, request was filed pursuant to 28 U.S.C. 292 and 28 U.S.C. 455(b)(1), for appointment of a district judge from outside the Southern District of Florida (1 SR 1-22).

This request was assigned by the Chief Judge to the next most senior judge (2 SR 2).

During the course of argument on that request the prosecution represented that no evidence would be presented as to any involvement by that judge, and that no other judge of the Southern District of Florida was accused of conspiracy with the Petitioner. The prosecution knew at the time of making that representation to the court that it was false, in that they had in their possession letters wherein their main witness had charged that the Petitioner could not only influence the Chief Judge and other judges (R 1-28-12) (Pet.App. 11)[1] of the district but also every judge on the bench, including the presiding

---

[1] Letter of Irvin Freedman (prosecution's main witness) to Special Agent Thomas Becker, 2/11/89: "We firmly believe that Judge Aronovitz, Judge King, Judge Smargon, Leo Greenfield . . . are behind the extreme pressure applied during and after the trial on us."

judge. Concealment by the government at that time of that evidence led to a denial of the motion on July 31, 1989 (R 1-30-3) (Pet.App. 12), with the comment by the acting Chief Judge: "If any pressure results to the presiding judge in this situation, it would be in the direction of permitting Defendant greater latitude than usual." (R 36-2).

During the course of the trial as the evidence developed, defense counsel complained that the prosecution's main witness testified that he was set up as a "sacrificial lamb", that the Petitioner could, through his relationship with the Chief Judge, influence every federal judge on the bench in the Southern District of Florida, and that he was protecting the judges, and the judges in turn were protecting him. Defense counsel complained that the prosecution was painting an entirely different picture from what it had said prior to trial at the hearing on the recusal motion (R 20-911-914) (Pet.App. 13).

Counsel then again moved for the recusal of all of the judges of the district and requested that a judge from outside the district be appointed.

The trial judge agreed with the defense assertion "that the government had indicated that there would be no adverse testimony as to any of the judges from the Southern District of Florida. . . . ", and concluded that she was in the position of "really having to adhere to the Eleventh Circuit's ruling until there becomes a compelling reason why I should not." For that reason and because a jury might reject Freedman's (the prosecution witness) testimony, she denied the motion.

Defense counsel persisted and the next day complained about Freedman's testimony wherein he asserted that he had uncovered a conspiracy among the judges to

protect Leo Greenfield, that the conspiracy was being covered up, and that there was extreme pressure on the trial of this case. (R. 20-911-914). The trial judge responded, in part, as follows (Pet.App. 13):

> And there was no indication in the moving papers from the government that the (sic) at least four members of the Judiciary of South Florida would be sullied – *much less – really of the whole judiciary.*
>
> I don't know what this jury is thinking, what have you, but even if they don't believe a word Mr. Freedman says, its not too salutory (sic) to hear some of the things that Mr. Freedman in fact believes.
>
> I don't know what the jury is speculating about. But at this juncture of the trial I am going to deny that motion. (Emphasis added) (R 20-911-914)

Having denied the motion, the trial continued on to conclusion.

On April 19, 1990, after the jury had been deliberating for one and one half days, they reported to the court that they were deadlocked and could not reach a verdict (R 30-2364). At approximately 1:00 p.m. on that day the trial judge brought the jury to the courtroom and directed that they break for lunch and return to their deliberations after lunch. Approximately 30 minutes after recommencing deliberations the jury announced that a verdict had been reached.

Thereafter, the guilty verdict on both counts was announced.

On May 3, 1990, Jack Sheldon Stevens, an optician and friend of the Petitioner, who had observed parts of the trial and recognized one of the jurors as one of his

clients, directed a letter to the Court advising the Court that one of the jurors advised him of certain circumstances which had occurred in the jury deliberations which had resulted in the breaking of the deadlock and finding of the guilty verdict. Because of Local Rule 16.E., Petitioner's counsel and Petitioner or anyone on their behalf were precluded from contacting the juror, Nathan Ramos. Petitioner's counsel ultimately obtained an affidavit from Mr. Stevens as to the events which had occurred (R 5-180 Ex. "A") (Pet.App. 14).

His affidavit reported that Nathan Ramos, a juror, who was his patient at his optical shop, had advised him that:

> b. The jurors were all hopelessly deadlocked when they left for lunch on Thursday, April 19, 1990.
>
> c. After the jurors returned from lunch, one of the jurors said he had found a typewritten letter or document and it was a piece of evidence.
>
> d. The jurors examined this document. It contained a list of dates, the amounts of checks, and the supposed dates of the meetings between prosecution witness Irvin Freedman and defendant Leo Greenfield. The amounts listed on this item added up to the total amount that the prosecution said was the amount supposed to be given to bribe the judge.
>
> e. Prior to this item being found by one of the jurors, there was no way that the jurors could make the case add up. But once the jurors holding out for Mr. Greenfield reviewed this item, they said it then added up and they found him guilty.
>
> f. Prior to arriving at their deadlock on Wednesday afternoon April 18, 1990, the jurors

carefully examined each item of evidence submitted to them for their consideration during deliberations and this particular document was not found in the exhibits.

g. The first time this particular document was received by the jury, to his knowledge, was when one of the jurors brought it to the attention of the other jurors after lunch on April 19, 1990.

h. After this document was presented and discussed by the jurors, they reached their verdicts of guilty. It was this document that tied the prosecution's case together.

i. It was not the tapes that convicted Leo Greenfield because the tapes were full of Mr. Freedman doing most of the talking.

David Rosen, one of Petitioner's lawyers, thereafter examined the court records to determine if any exhibit in the court file as were admitted into evidence matched the description of the document. His affidavit filed with the District Court reported that no such exhibit matching that document described in the Ramos' affidavit had been admitted into evidence (R 5-180 Ex. "A").

A motion for leave to interview jurors was filed, based upon information directed to the Court on May 3, 1990 (R 5-180 Ex. "A") (Pet.App. 15).

By that motion the Petitioner sought an evidentiary hearing on the issue of the extraneous, prejudicial information which had been considered by the jury, or in the event that the court denied the evidentiary hearing, that defense counsel be permitted to interview the jury, pursuant to Local Rule 16.E., (Pet.App. 6), which prohibits lawyers, after the jury has been discharged, from communicating with any juror on any subject without a prior order from the court licensing such communication and

that an evidentiary hearing be held after the jurors had been interviewed by defense counsel (R 5-180 Ex. "A").

Said motion further requested that if the court denied leave to interview the jury, that Local Rule 16.E. be declared unconstitutional in that same discriminated against lawyers and violated the Petitioner's rights under the first and fifth amendment, (Due Process Clause), which guarantees equal protection of the laws, in that said rule does not amount to reasonable regulation of lawyers. Furthermore, in view of the fact that the Petitioner was a lawyer it abridged his constitutional rights under the first, fifth, and sixth amendments of the Constitution (Pet.App. 15).

In its written response to the motion the government acknowledged that an evidentiary hearing should be held, and said (R 31-47):

> Despite the patent innocuousness of whatever it is that juror Ramos told Mr. Stevens, the Government acknowledges that if this Court were to consider defendant's motion on the merits, *a limited evidentiary hearing would be necessary. The Government takes this position in light of the case law in this Circuit, which appears to require an evidentiary hearing whenever there is a "colorable showing of extrinsic influence" on the jury.* (Emphasis added)

They thus acknowledged that the affidavit constituted a "colorable showing of extrinsic influence" and pointed out to the Court that "an evidentiary hearing was necessary" under "the case law in this Circuit."

During the course of argument on the motion, the prosecution counsel again agreed with the defense that an evidentiary hearing should be held and stated (R 17-187-15):

> However I think the Court frankly would be better served to *bring that out in an evidentiary hearing rather than just rely on the Sheldon affidavit.*
>
> The proper course would be to have Mr. Ramos, the juror in question and probably the foreperson, to check his recollection to see if there was such a document. If there was, to determine by looking at the document if it could have had any possible prejudicial effect. (Emphasis added)

Notwithstanding the agreement of the government that a colorable showing had been made, that an evidentiary hearing was necessary, or at least, a proper interview of Mr. Ramos, the trial court at the conclusion of the argument denied the motion for an evidentiary hearing, denied the motion for leave to interview the jury or Mr. Ramos, and declined to rule on the constitutional issue, saying: "I decline under the status of this case." (R 31-51-54) (Pet.App. 16).

A post-conviction motion for recusal of the panel of judges in the Southern District had likewise been filed, and simultaneously argued with the foregoing motion, which sought relief only by way of having a judge from outside the district consider only the proceedings post-conviction. In said motion Petitioner waived the right of the Petitioner to obtain a new trial by retroactively applying or arguing any matters pertaining to the denial of the earlier recusal motions.

Thereafter, on August 10th, the court entered a written order on the post-trial motions, including the motions which had been previously ruled upon on July 27th denying the May 29th motion for new trial and motion for judgment of acquittal, denying the motion for recusal, denying the motion for new trial on the grounds of newly

discovered evidence (the extrinsic document considered by the jury) and denying the evidentiary hearing, and denying the motion to interview the jury (R 7-200-9) (Pet.App. 17).

Appeal to the Court of Appeals for the Eleventh Circuit progressed through its normal stages. In the appeal, the Petitioner, with approval of the court filed an expanded brief of 75 pages and raised nine significant issues of law as follows (Pet.App. 21):

I.

> Judge Nesbitt should have been disqualified from presiding over this obstruction of justice case because the prosecution's evidence not only portrayed the local judges as victims of the crime but also impugned their integrity.

II.

> The trial court constructively amended the indictment by telling the jury that it could convict the Defendant for obstruction of justice without finding that this obstruction concerned *United States v. Irvin Freedman*, where the indictment specifically charged that the Defendant obstructed justice with respect to the case of *United States v. Irvin Freedman*.

III.

> The prosecution injected error into the trial by calling a witness to testify on a question of law and compounded the error by selecting a witness who was a judge, the Chief Judge of the District, an apparent victim of the crime, and mistaken on the question of law.

IV.

> The trial court excluded crucial and relevant expert testimony on behalf of the Defendant

which would have shown that the taped conversations between Greenfield and Freedman were not evidence of a prior bribery scheme.

V.

The trial court erroneously admitted prosecution evidence that Greenfield's endeavor had injured Freedman's rights, excluded opposing evidence from the defense, and gave a jury instruction supporting the prosecution's theory.

VI.

The Court of Appeals should overrule the Eleventh Circuit precedent, *U.S. v. Silverman*, stretching the scope of the obstruction of justice statute to reach "rainmaking" fraud or at least modify this decision to conform with the Constitution and the true meaning of the obstruction statute.

VII.

The trial court erred in admitting Defendant's statements made in the course of plea discussions initiated but not ended by the Government, as the court misinterpreted both the language and purpose of the governing rules, and was erroneous in its findings of fact.

VIII.

The trial court erred in its refusal of permission to interview jurors and in its denial of Defendant's motion for a new trial on grounds of newly discovered evidence that extraneous prejudicial information infected the verdict.

IX.

The individual errors at trial, taken together, combined to deprive Defendant of a fundamentally fair trial.

(Supplemental Document 1)

The matters involved in the appeal pertaining to the abridgment of the constitutional rights of the Petitioner, by virtue of Local Rule 16.E. came to the attention of various organizations. As a result three amici curiae briefs were filed by four organizations, to wit, The American Civil Liberties Union Foundation of Florida, and The First Amendment Foundation (Supplemental Document 2), The National Jury Project (Supplemental Document 3), and The National Association of Criminal Defense Lawyers, Inc. (Supplemental Document 4).

Each of the amici briefs dealt with the issue pertaining to the violation of the constitutional rights of the Petitioner, in that because of his status as a defendant-lawyer practicing before the United States District Court for the Southern District, he was deprived of the right which every citizen residing within the jurisdiction of the United States District Court for the Southern District of Florida has, to wit, the right to discuss with willing members of a jury by which he may have been tried, matters pertaining to the jury deliberations.

Thus, the Petitioner was deprived of his right of free speech, his right to due process of law, his right to be tried by an impartial jury and be confronted with the witnesses against him, under the first, fifth, and sixth amendments of the Constitution, and thereby his constitutional rights were violated.

Oral argument was held in Miami, Florida, on December 3, 1993. The amici curiae interests were not granted that privilege.

On December 17th notwithstanding the constitutional and other significant issues raised by the appeal, the Court of Appeals for the Eleventh Circuit entered its Per Curiam Opinion, and noted same "Do Not Publish"

(Pet.App. 1). The said opinion without a single comment as to any of the valid and significant issues, including the constitutional issues pertaining to Local Rule 16.E., the constitutional rights of the Petitioner to a fair trial before a fair judge and an impartial jury, the right to hold the evidentiary hearing or interview the jury, acknowledged as necessary by the government but denied by the court, has placed a judicial stamp of approval on the deprivation of the Petitioner's constitutional rights and the authority of the judges of the Southern District of Florida to violate with impunity the provisions of 28 U.S.C. 292(b) and 28 U.S.C. 455(b)(1), both of which sections were intended by Congress to insure a Defendant of a fair trial, before a fair and impartial judge.

The Petitioner asserts that the entry of the Per Curiam "Do Not Publish" opinion rendered by the Court of Appeals for the Eleventh Circuit, so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court from the law as is generally applied throughout the Eleventh Circuit, and other circuits, as to call for an exercise of this Court's powers of supervision in granting this Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

Upon motion made by the Petitioner, a colorable showing was made to the United States District Judge that the jury considered extrinsic evidence in its deliberations. The prosecution agreed that an evidentiary hearing was necessary; nevertheless, the court denied such hearing and further denied the Petitioner or his counsel the

right to interview the jury, and declined to rule on the constitutionality of Local Rule 16.E., which precluded the Petitioner, a lawyer, or anyone on his behalf, from discussing the extrinsic evidence matter with any former juror. The Court of Appeals for the Eleventh Circuit upheld the trial judge per curiam without comment, notwithstanding that the rulings were contrary to prior rulings of the Eleventh Circuit in numerous prior cases, as to the evidentiary hearing and jury interview and contrary to the ruling of this Court as to the constitutionality of Local Rule 16.E. *Gentile v. State Bar of Nevada*, 501 U.S. ___, 111 S.Ct. 2720, 115 L.Ed.2d 888, 897 (1991).

Because accusations had been made as to the alleged involvement of all the judges of the Southern District of Florida, upon motion pursuant to 28 U.S.C. 455(b)(1), to recuse the panel of judges the acting chief judge, in ruling on the motion, made a finding which recognized that the court might be prejudiced, but denied recusal. Upon the entire panel being "sullied" by evidence presented by the prosecution, the trial judge again denied recusal. The court of appeals, contrary to its own rulings in prior cases and the ruling of this Court in *Liljeberg v. Health Acquisition Services*, 486 U.S. 847, 865 (1988), notwithstanding the constitutional issues which arose as a result of the deprivation of the Petitioner's constitutional rights under the first, fifth and sixth amendment of the Constitution of the United States, affirmed with a brief no comment "Do Not Publish" per curiam opinion.

Its decision has so far departed from its own accepted rulings and the rulings of this Court and the usual course of judicial proceedings and has sanctioned such a departure by the lower court as to require this

Court to exercise this Court's power of supervision and settle the substantial and important constitutional questions which have arisen.

I.

LOCAL RULE 16.E. OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IS FACIALLY UNCONSTITUTIONAL AS AN IMPERMISSIBLE PRIOR RESTRAINT THAT ABRIDGED THE PETITIONER'S FIRST, FIFTH AND SIXTH AMENDMENT RIGHTS AND THEREFORE SHOULD BE DECLARED UNCONSTITUTIONAL ON ITS FACE OR UNCONSTITUTIONAL AS APPLIED TO THE PETITIONER ON THE FACTS OF THIS CASE.

When twelve citizens from a community complete their service as trial jurors in a United States District Court, and are discharged from that temporary obligation, they resume their former status as free citizens and members of the public at large.

The former jurors are free, under the common law of the United States and the first amendment of the United States Constitution to communicate with whomever they wish about whatever subject they wish – including their experiences during the trial in which they have just served, and their privately-conducted verdict deliberations. As the Tenth Circuit has observed:

> There is no strict secrecy rule. Jurors are not prohibited by law from discussing their deliberations after the case is over. . . . Indeed, in some places lawyers routinely inquire and jurors sometimes make public statements about what convinced them.

United States v. Dempsey, 830 F.2d 1084, 1089 (10th Cir. 1987).

The jurors' post-discharge comments about the trials they have participated in constitute important political speech about the functioning of the judicial branch of the United States government, and as such are at the core of the communication activity protected by the first amendment. *Gentile v. State Bar of Nevada*, 501 U.S. ___, 111 S.Ct. 2720, 115 L.Ed.2d 888, 897 (1991).

The potentially crucial importance of post-discharge trial jurors' speech to the fair and impartial administration of justice, and to the vindication of the fair trial and due process rights of individual criminal defendants, has long been recognized in the law of evidence in the courts of the United States. In fact, in criminal cases it is a sixth amendment fair trial right that is at stake if a jury has been improperly influenced by extrinsic materials, since the jury must decide the case solely on the evidence properly sent to it by the trial judge. *Gentile, supra*, 115 L.Ed.2d at 923 (per Rehnquist, C.J.: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors"); *Turner v. State of Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961).

In accord with long established common law principles imported from England, it has always been the law in this country that a trial juror may testify in court after his discharge about any facts bearing upon the question of the existence of any extraneous influence during the jury deliberations. *Tanner v. United States*, 483 U.S. 107, 117-19 (1987); *Parker v. Gladden*, 385 U.S. 363 (1966);

Mattox v. United States, 146 U.S. 104, 149 (1892); *United States v. Calbas*, 821 F.2d 887, 897 (2d Cir. 1987), *cert. denied*, 485 U.S. 937 (1988). That principle is safeguarded by *Fed.R.Evid.* 606(b) which provides (Pet.App. 9):

> (b) **Inquiry into validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict . . . a juror may . . . testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

A significant body of case law exists regarding a criminal defendant's constitutional right to question the validity of a guilty verdict in his case, and the courts have long recognized that allowing the trial jurors to speak about what went on in the jury room is crucial to the determination of whether or not "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975); *Paz v. United States*, 462 F.2d 740, 746 (5th Cir. 1972), *cert. denied*, 414 U.S. 820 (1973); *United States v. Gaffney*, 676 F.Supp. 1544 (M.D. Fla. 1987).

The Eleventh Circuit has long recognized that: "[S]ince it is the court's duty to ensure that the jury verdict is in no way tainted by improper outside influences, the court must investigate the asserted impropriety upon merely a colorable showing of extrinsic influence." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1980). See also *United States v. De La Vega*, 913 F.2d 861, 870 (11th Cir. 1990). "Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was

prejudicial." *United States v. Harris*, 908 F.2d 728, 733 (11th Cir. 1990), citing *United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985). "Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error." *Harris*, 908 F.2d at 733 citing *United States v. Chiantese*, 582 F.2d 974, 979 (5th Cir. 1978) (*en banc*), *cert. denied*, 444 U.S. 922 (1979). When the impropriety alleged is outside influence upon the jury, the trial court has no discretion to refuse interrogating the jurors. *Harris*, 908 F.2d at 733-34.

When the trial court has refused to conduct any hearing, the appellate court must assume that the juror misconduct alleged by the defendant actually occurred. *Richardson v. United States*, 360 F.2d 366, 369 (5th Cir. 1966) (the "allegation . . . must stand as confessed since no hearing was conducted."). *See also Harris*, 908 F.2d at 734; *Chiantese*, 582 F.2d at 980. In assessing what is a "colorable showing", the trial court must accept the facts alleged at face value.

The courts have similarly recognized the right of a criminal defendant and his counsel to be present and participate in any judicial proceeding during which jurors speak about their deliberations, and to propound questions to the jurors. *United States v. Calbas*, 821 F.2d 887 (2d Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *United States v. Heller*, 785 F.2d 1524, 1528 (11th Cir. 1986); *United States v. Caldwell*, 776 F.2d 989, 996 (11th Cir. 1985); *United States v. Brantley*, 733 F.2d 1429, 1440 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); *United States v. Herring*, 568 F.2d 1099, 1105-106 (5th Cir. 1978).[2]

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[2] The need for a criminal defendant and his counsel to have access to information about the jury deliberations after

Free communication between defense counsel and trial jurors who have been discharged after the conclusion of the trial is conducive to accomplishing important goals: Safeguarding the administration of justice from the corruption of improper jury verdicts; and guaranteeing the due process and fair trial rights of a criminal defendant protected by the fifth and sixth amendments. As the American Bar Association has observed in Ethical Consideration 7-29 of the *ABA Model Code of Professional Responsibility*: "Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected." (Pet.App. 18).

Thus the ABA Code, which is in effect for lawyers practicing in the Southern District of Florida (and Local Rule 16.C.), (Pet.App. 6), only prohibits a lawyer who has participated in a trial from asking questions or making comments to the trial jurors, after discharge, "that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service." DR7-108(D). (Pet.App. 19). That restriction is restated in EC 7-29. (Pet.App. 18).

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discharge is underscored by the requirement that it is the defendant who must establish that extrinsic matters were considered by the jury. *United States. v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.), *cert. denied*, 484 U.S. 969 (1987); *United States v. Jones*, 597 F.2d 485 (5th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). Thus, a party claiming that the jury was improperly influenced must be allowed to prove that claim. *Remmer v. United States*, 350 U.S. 377 (1956); *Richardson v. United States*, 360 F.2d 366 (5th Cir. 1966).

Local Rule 16.E. (Pet.App. 6), however, precludes post-trial jury contact by a lawyer or a representative of a lawyer with any juror who served in a trial. A practicing lawyer, either as a lawyer or as a defendant, contrary to the right of a non-lawyer defendant, cannot have post-trial contact. Had the Petitioner not been a lawyer, he could have personally or by representative, except through his most interested representative, his lawyer, interviewed the juror, and obtained an affidavit as to all of the facts pertaining to the extrinsic evidence directly from Mr. Ramos. Rule 16.E. is unconstitutional on its face and as applied to this case, for four fundamental reasons: (a) It is a classic impermissible prior restraint; (b) It is contrary to ABA guidelines and Supreme Court precedent regulating the professional speech of lawyers, and in this case the Petitioner; (c) It is an impermissible content-based restriction on speech; and (d) In this case the trial court rejected the first amendment challenge and equal protection to the Petitioner without making specific findings of fact or law.

Rule 16.E. was promulgated in the Southern District of Florida prior to the 1985 amendments to Rule 83, *Fed.R.Civ.P.* and Rule 57, *Fed.R.Crim.P.*, and prior to the 1988 amendments to 27 U.S.C. Section 2071, all of which require appropriate public notice of proposed local district court rules and an opportunity for comment from interested persons. Thus, there is no official record of why it was enacted or of any pre-enactment analysis or discussion.[3]

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[3] According to the Hon. Kenneth L. Ryskamp, U.S. District Court, chair of the local rules committee of the Southern District of Florida, the District has no minutes or notes reflecting the

By its own text the rule specifically articulates two narrow goals: (1) to avoid embarrassment to any trial juror; and (2) to avoid influencing a trial juror's actions in the future, should he be called to serve again in another trial jury.

The American Bar Association has adopted standards both for constitutionally restricting lawyers' "professional speech" which might prejudice fair trial rights, and specifically for regulating communications between lawyers and jurors. The former have been approved by a majority of the Supreme Court in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). Local Rule 16.E. is contrary to all regulations. That the rule is contrary to *Gentile* is scarcely surprising since it is nothing more than a greatly restrictive adaptation of old Canon 23, adopted in 1908 and rejected by the ABA nearly a quarter of a century ago.

Recent decisions of the Eleventh Circuit, to wit, *United States v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991) and *United States v. Griek*, 920 F.2d 840 (11th Cir. 1991), have upheld the rule against constitutional challenges.

The Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. ___, 111 S.Ct. 2720, 115 L.Ed.2d 888, 897 (1991), decided during the pendency of the appeal but prior to the opinion, and briefed extensively by both the amici and the Petitioner in the appeal, makes clear that Rule 16.E. – and the Eleventh Circuit analysis upholding the rule's validity against first amendment challenges in *Griek* and *Hooshmand*, *supra* – is constitutionally untenable.

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history of Rule 16.E. and "there are no records which can shed any light on the adoption of this rule." (See Pet.App. 20).

In reversing the Nevada State Supreme Court, which had approved a disciplinary sanction, the U.S. Supreme Court found the Nevada rule void for vagueness, finding a "need to eliminate the impermissible risk of discriminatory enforcement." 115 L.Ed.2d at 908. The Court went on to hold that governmental regulation impinging on lawyers' first amendment speech must at a minimum pass muster on a "substantial likelihood of material prejudice" standard, 115 L.Ed.2d at 915, and no "lesser showing" is acceptable. The Chief Justice stated in Part II of his opinion for the Court:

> [T]he "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trial. . . . The restraint on speech is narrowly tailored to achieve those objectives . . . it applies only to speech that is substantially likely to have a materially prejudicial effect. . . . *Id.* at 923-24.

The lessons of *Gentile* for the instant case are these: Lawyers participating in criminal proceedings do not "forfeit their First Amendment rights", as Justice O'Connor put it in her concurring opinion, 115 L.Ed.2d at 928. The rules regulating lawyers' speech in those cases must contain clear, rather than vague, standards. Those regulations of lawyers' speech in connection with criminal cases must be narrowly tailored to accomplish their intended goal, and can prohibit only specific lawyer speech that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Local Rule 16.E. fails to pass the constitutional scrutiny required by *Gentile*. The rule allows judges to prohibit lawyer speech on a vague and imprecise "good

cause" standard that permits discriminatory enforcement.[4] It allows the total prohibition of such lawyer speech regardless of whether such speech will have a substantial likelihood of materially prejudicing an adjudicative proceeding. And it fails to be narrowly tailored in that it does not rely on the least drastic available alternatives of regulation through reliance on Bar ethical rules, contempt sanctions for violations, and similar remedies.

A further fundamental procedural ground presented to the court of appeals for reversal is because the trial court rejected the first amendment challenge without making specific findings of facts or law. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States v. Noriega* (*In Re Cable News Network, Inc.*), 917 F.2d 1543, 1549-50 (11th Cir.), *cert. denied*, 111 S.Ct. 451 (1990); *In Re Globe Newspaper Co.*, 920 F.2d 88, 91, 93, 97 (1st Cir. 1990). Indeed, the trial court was urged to pass on the first amendment issues, but it "decline[d] to under the status of the case."

Local Rule 16.E. of the Southern District of Florida is vague and overbroad, lacking in clearly defined standards, and is susceptible of arbitrary application. Further, it impermissibly acts as a prior restraint on the free

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[4] *E.g., Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1197-1200 (11th Cir. 1991) (Florida's scheme regulating newspaper vending racks at interstate rest areas, lacking a meaningful standard for guiding the decisionmaker's exercise of discretion, held an unlawful prior restraint facially violative of the first amendment because it poses a real and substantial threat of official censorship).

speech rights of the public, of trial jurors, of criminal or civil lawyer defendants, and of lawyers practicing in the Southern District of Florida. Moreover, it is a prior restraint that places the burden on the person seeking to communicate to persuade the government why the speech should be allowed. Accordingly, for all these reasons, the Petitioner respectfully requests this Court to declare Rule 16.E. unconstitutional on its face. Alternatively, Petitioner would request the Court in the interest of protecting the first, fifth and sixth amendment rights of this Petitioner as were violated by application of said rule, to declare the rule unconstitutional as applied to the Petitioner by the Court of Appeals for the Eleventh Circuit and the trial court in the instant case.

II. THE DENIAL OF THE MOTIONS FILED PURSUANT TO 28 U.S.C. 292(b) and 28 U.S.C. 455(b)(1) ON GROUNDS OF PREJUDICE SINCE THE PROSECUTION'S MAIN WITNESS ACCUSED BY NAME SEVERAL SITTING JUDGES AND, WITHOUT DESIGNATION, GENERALLY ALL THE JUDGES OF THE SOUTHERN DISTRICT OF FLORIDA AS BEING IN A CONSPIRACY WITH THE PETITIONER, AND THE ADMISSION OF THE CHIEF JUDGE'S TESTIMONY AS AN EXPERT WITNESS, OVER OBJECTION OF THE PETITIONER, WAS A VIOLATION OF THE PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS AND DENIED THE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE

This case was presided over by a judge who appeared under the evidence of the government to be

either a co-conspirator with Petitioner in judicial corruption, or a victim besmirched by the Petitioner's alleged slander of judges. The prosecution largely concealed this evidence during pretrial proceedings on recusal. When the evidence testified to by the government's main witness emerged at the time, notwithstanding that the testimony was from a felon convicted of perjury, the presiding judge acknowledged that the testimony sullied the entire judiciary of South Florida (Pet.App. 13), but at that late juncture the judge refused to disqualify herself, and contrary to the observation made by the acting Chief Judge, went in the direction of permitting the Petitioner less latitude than usual.

Thus, the prosecution managed, by inflaming the court, to subject the accused to a tainted trial at which the appearance of impartiality might reasonably be questioned by lay observers and by the trial jurors as well.

The appearance of impartiality is crucial to the legitimacy of our system of justice. Congress has codified this policy in 28 U.S.C. Section 455(a), which provides in pertinent part that, "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Acquisition Services*, 486 U.S. 847, 865 (1988). The standard for recusal under this section is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the

judge's impartiality." *United States v. Kelly*, 888 F.2d 732, 744-745 (11th Cir. 1989). "Because 28 U.S.C. Section 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). As the Supreme Court cautioned in *Liljeberg*, "The problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." 486 U.S. at 864-65. The circumstances must "significantly quell the concerns of the skeptic." Thus "[s]ection 455 requires disqualification when others would have reasonable cause to *question* the judge's impartiality." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990). The legal standard focuses not on a judge's or a prosecutor's perceptions about a judge's partiality, but rather on what an objective, reasonable person would question, knowing all of the relevant circumstances. "The reasonable person is presumed to possess knowledge of all the circumstances." *Huff v. Standard Life Ins. Co.*, 683 F.2d 1363, 1369 (11th Cir. 1982). Finally, Section 455 requires that any doubt be resolved in favor of recusal. *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988).

The governing recusal law also has a Due Process component. When the circumstances of the case create a likelihood or appearance of bias by the judge suggesting that the judge may not be able to " 'hold the balance nice, clear and true between the State' " or the court itself and

the accused, then recusal is required. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974), quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Matter of Jafree*, 741 F.2d 133, 135 (7th Cir. 1984) under *Fed.R.Crim.P.* 42(b), judges should have disqualified themselves from contempt hearing of lawyer accused of authoring "documents accusing judges of corruption, prejudice, drunkenness, and either the giving or receiving of bribes."

In *Liljeberg*, the Supreme Court outlined the following factors which should have been weighed in the present case:

> We conclude that in determining whether a judgment should be vacated for a violation of Section 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted).

The very nature of the prosecution's case, the testimony of its star witness and corroborating circumstances, all created an accusation that each and every judge sitting in the Southern District was subject to corruption by the Petitioner.

Such accusations weighed heavily against the Petitioner in the mind of the presiding judge.

To further stimulate that perception the Chief Judge, the alleged victim of the alleged crime, was called as an

expert witness by the government. In his testimony, the Chief judge praised the work of the presiding judge and then was permitted to testify, over objection, that he had personal knowledge of situations where lawyers falsely told clients that the lawyer could bribe the judge or fix the case. He did not say whether this personal knowledge included the Petitioner's case, but that would have been obvious to the jury. He further was permitted, over objection, to testify that "rainmaking" has a bad effect on the due administration of justice.

It would be unrealistic to believe that lay observers and the jurors would not conclude that the trial was being presided over by one of the Petitioner's victims or one of his conspirators, and if one of his victims, then the jury would be inclined to help her reject the insult; or if one of his conspirators, then the jury would show both the judge and the Petitioner that they would not permit such conduct.

The prosecution, by misrepresentation of the evidence in the pretrial proceeding for recusal, subjected the accused to a trial at which his fifth amendment due process right to an impartial judge was trampled and his sixth amendment right to an impartial jury was imperiled.

If "justice must satisfy the appearance of justice" and if impartiality is the standard that must be met, it must be acknowledged that the acting Chief Judge of the Southern District recognized that impartiality was negated at the outset. He concluded that the presiding judge could move in the direction of greater latitude, but he failed to recognize that, if she found the matter distasteful to her, as she

indicated by her comment "much less – really of the whole judiciary" as to the evidence from the government's main witness, she could and would move in the direction of lesser latitude than required for conducting a fair trial. The wrongfulness of this conduct was multiplied when the judges of the Court of Appeals ignored the doctrine of fairness, the law applicable to the issues presented here and the additional issues presented in the appeal and the constitutional rights of the Petitioner, by placing the stamp of secrecy on the conduct of the jury in their deliberations and the lack of impartiality of the trial judge in permitting such to occur.

The conduct of the trial judge in steadfastly resisting recusal, supported by the per curiam opinion, without comment, by the judges of the Court of Appeals for the Eleventh Circuit in covering up the failure to recuse and the intrusion of the extrinsic document considered by the jury in their deliberations, bespeaks of a violation of the Petitioner's constitutional rights to a fair trial presided over by a fair judge.

CONCLUSION

The Writ of Certiorari should be granted for the reasons that: The prosecution recognized that the law required that the Petitioner be granted an evidentiary hearing or at the very least, a jury interview as to the extraneous evidence considered by the jury. Nevertheless, the judge discriminatorily applied the gag rule of Local Rule 16.E., violating the first amendment rights of the Petitioner. This violation, in conflict with its own prior opinions, was subsequently approved by the Eleventh Circuit, in contradiction of this Court's holding in *Gentile*,

at 115 L.Ed.2d 908, a "need to eliminate the impermissible risk of discriminatory enforcement".

Furthermore, both trial judges in ruling on the 455(b)(1) motion recognized the prejudice which would arise but discriminatorily refused to follow the law, violating the fifth and sixth amendment rights of the Petitioner. The court of appeals further ignored the ruling of this Court in *Liljeberg, supra.*

It is apparent that the trial court and the court of appeals have failed to follow the precedents as previously established within the Eleventh Circuit on both issues presented, as well as in the other seven issues presented in the Petitioner's brief and the amici briefs. These failures constitute deviations from the law as applied throughout the United States and the opinions of this Court cited herein, and from the accepted usual course of judicial proceedings and has sanctioned such substantial departures as to call for the exercise of this Court's jurisdiction.

Unless this writ is granted, the right of free speech as guaranteed under the first amendment will continue to be suppressed by Local Rule 16.E. and the determination of Petitioner's right to a fair trial will be forever lost in the seal of secrecy provided by a per curiam, no comment "DO NOT PUBLISH" opinion.

As Chief Justice Warren E. Burger has said while on the Court of Appeals: "A court which is final and unreviewable needs more careful scrutiny than any other."

The Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Leo Greenfield, Pro Se
1680 N.E. 135th Street
North Miami, FL 33181
(305) 893-9270

No. _____

In The

Supreme Court of the United States

October Term, 1993

LEO GREENFIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PET.APP. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5681

D.C. Docket No. 89-130-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEO GREENFIELD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(December 17, 1993)

Before HATCHETT and ANDERSON, Circuit Judges, and YOUNG*, Senior District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

Judgment Entered: December 17, 1993
For the Court: Miguel J. Cortez, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 11 1994

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*Honorable George C. Young, Senior U. S. District Judge for the Middle District of Florida, sitting by designation.

PET.APP. 2
United States District Court
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

V.

LEO GREENFIELD
2040 N.E. 194 Dr.
North Miami Beach, FL 33179

(Name and Address of Defendant)

JUDGMENT IN A CRIMINAL CASE

Case Number:
89-130-Cr-NESBITT
(Filed JUL 31 1990)

E. David Rosen, Esq.
Roy Black, Esq.
Joseph Beeler, Esq.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[_ guilty _ nolo contendere] as to count(s) _____, and
_ not guilty as to count(s) _____.

THERE WAS A:
[_ finding X verdict] of guilty as to count(s) one and two _____.

THERE WAS A:
[_ finding _ verdict] of not guilty as to count(s) ___.
_ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Solicitation and receipt of money by false representation, 18:1503 as to count one.

Financial transaction involving unlawful activity, 18:1957 as to Count two.

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count I of the indictment that the defendant is hereby committed to the custody of the Bureau of Prisons for imprisonment for a term of thirty (30) months.

IT IS FURTHER ADJUDGED as to Count two that the imposition of sentence is hereby withheld and the defendant is placed on probation for a period of three (3) years.

As a special conditions of probation,
IT IS FURTHER ADJUDGED that the defendant shall pay a fine to the United States in the sum of $50,000 with payments to be arranged by the United States Probation Office.

IT IS FURTHER ORDERED that defendant is assessed $50 as to each of Counts 1 and 2.

Voluntary surrender on or before Sept. 10, 1990 to designated institution.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate with only law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) one and two as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States

attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

_ The Court orders commitment to the custody of the Attorney General and recommends:

July 27, 1990
Date of Imposition of Sentence

July 30, 1990
Signature of Judicial Officer

Lenore C. Nesbitt, U.S. District Court
Name and Title of Judicial Officer
July 30, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date
_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By_____
Deputy Marshal

PET.APP. 3

1. United States Constitution, first amendment:

   Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

PET.APP. 4

2. United States Constitution, fifth amendment:

   No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

PET.APP. 5

3. United States Constitution, sixth amendment:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ***by an impartial jury*** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ***to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.***

PET.APP. 6

RULE 16. ATTORNEYS

. . . .

C. **PROFESSIONAL CONDUCT**. The standards of professional conduct of members of the Bar of this Court

shall include the current Canons of Professional Ethics of the American Bar Association. For a violation of any of these canons in connection with any matter pending before this Court, an attorney may be subjected to appropriate disciplinary action.

. . . .

E. **RELATIONS WITH JURY**. All attempts to curry favor with juries by fawning flattery, or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. Before, during, and after the trial, a lawyer should avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not. Provided, however, after the jury has been discharged, upon application in writing and for good cause shown, the Court may allow counsel to interview jurors to determine whether their verdict is subject to legal challenge. In this event, the Court shall enter an order limiting the time, place, and circumstances under which the interviews shall be conducted. The scope of the interviews should be restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.

PET.APP. 7

Section 455. Disqualification of justice, judge, or magistrate.

. . . .

(b). He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

PET.APP. 8

Section 292. District judges

. . . .

(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

PET.APP. 9

4. Rule 606(b), *Federal Rules of Evidence*:

ARTICLE VI. WITNESSES

. . . .

Rule 606. COMPETENCY OF JUROR AS WITNESS.

. . . .

(b) *Inquiry into Validity of Verdict or Indictment.*

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent

from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

PET.APP. 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)	NO. 89-0130
)	CR-NESBITT
Plaintiff,)	18 U.S.C. §1503
v.)	18 U.S.C. §1957
)	
LEO GREENFIELD,)	INDICTMENT
Defendant.)	
)	

THE GRAND JURY CHARGES THAT:

COUNT ONE

1. At all relevant times, Irvin Freedman ("Freedman") had been found guilty by a jury of violating various criminal laws in *United States of America v. Irvin Freedman, et al.* (No. 81-434-Cr-SMA), and had been sentenced to seven years in prison as a result of this conviction.

2. In or about August of 1986, the direct appeal of his conviction having been denied, Freedman was given a date to report to prison to begin serving his sentence.

3. At all relevant times, LEO GREENFIELD, defendant herein, was an attorney in private practice in North Miami, Florida, doing business as Leo Greenfield, P.A., in the law firm of Greenfield & Duval, P.C.

4. From in or about August of 1986 through in or about October of 1987, the exact date being unknown to

the grand jury, LEO GREENFIELD, defendant herein, did corruptly endeavor to influence, obstruct and impede the due administration of justice with respect to the federal criminal case of *United States of America v. Irvin Freedman* (No. 81-434-Cr-SMA), in that LEO GREENFIELD did solicit and receive from Irvin Freedman a sum of money by falsely representing that LEO GREENFIELD would ensure, through the corrupt means of payment of money to a judicial officer, that Freedman's sentence would be reduced, whereas, in truth and in fact and unknown to Freedman, Greenfield never made such payment to a judicial officer.

In violation of Title 18, United States Code, Section 1503.

COUNT TWO

5. Paragraphs one through four, inclusive, of Count One of the Indictment are realleged and incorporated in this Count as though set forth fully herein.

6. On or about November 8, 1986, in the Southern District of Florida, LEO GREENFIELD, defendant herein, in a monetary transaction affecting interstate and foreign commerce, did knowingly cause to be deposited in the bank account of Leo Greenfield, P.A., at the Pan American Bank, a financial institution, a cashier's check in the amount of $15,000, caused to be issued by Irvin Freedman, which check was derived from an obstruction of justice in violation of Title 18, United States Code, Section 1503, a specified unlawful activity as defined in Title 18, United States Code, Section 1956(b)(7).

In violation of Title 18, United States Code, Section 1957.

A TRUE BILL

/s/ Virginia C. Sloughter
FOREPERSON

/s/ Dexter Lehtinen
DEXTER LEHTINEN
United States Attorney
Southern District of Florida

/s/ James M. Cole
JAMES M. COLE
Deputy Chief
Public Integrity Section
Criminal Division
United States Department
of Justice
Washington, D.C.

/s/ David E. Green
DAVID E. GREEN
Trial Attorney
Public Integrity Section
Criminal Division
United States Department
of Justice
Washington, D.C.

PET.APP. 11

From: Irvin Freedman
To: Special Agent Thomas Becker
Date: 2/11/89

. . . .

> We firmly believe that Judge Aronovitz, Judge King, Judge Smargon, Leo Greenfield and Milton Grusmark using perhaps Fred Schwartz and his office are behind the extreme pressure applied during and after the trial on us.

. . . .

> *I agreed to deliver Leo Greenfield to you with no regard for my personal safety or that of my family. I delivered. I agreed to keep you abreast of any happenings as to the case. I delivered and am still delivering. I agreed to testify before the Grand Jury after being threatened by Jim Cole.* (Emphasis is Freedman's). (Exhibit "27")

PET.APP. 12

EXTRACT FROM ORDER OF ACTING CHIEF JUDGE NORMAN C. ROETTGER, JR., ENTERED JULY 27, 1989:

> This court has considered the various situations inherent and even likely to arise in this trial and finds no disabling conflict present. If any pressure results to the presiding judge in this situation, it would be in the direction of permitting Defendant greater latitude than usual.

PET.APP. 13

Extract R 20-911-914:

> MR. BLACK: Regarding the motion to recuse. I just did want to put some other things on the record that Mr. Freedman said late yesterday afternoon after last bringing it up again. Mr. Freedman now testifies that, "I have uncovered a conspiracy among the judges to protect Leo Greenfield the other way." He says that means that Greenfield protects the judges and the judges now protect him, so there's extreme pressure on this case.
>
> He says again that there's extreme pressure during the Outrigger trial, extreme pressure during this trial, that the conspiracy is being covered up, and that's a conspiracy between Mr. Greenfield and judge King, that he's going to hire a private investigator to do this. He's asked special agent Becker if he's already investigating this. He wants his thoughts on this.
>
> "I will continue to do my investigation so long as you are investigating this conspiracy and so long as it's all going to be reversed at the end, I will sit back and not do anything."
>
> I think that also goes to the issue of all the judges in this district, Your Honor.
>
> THE COURT: Well, I will agree to this extent, Mr. Black. Of course, I didn't ever have a chance to rule on the motion until now, but based on the moving papers, if it had been up to me, of course, I would have considered just what the papers said. And there was no indication in the moving papers from the government that the at least four members of the judiciary of South

Florida would be sullied, much less – really of the whole judiciary.

I don't know what this jury is speculating about, but at this juncture of the trial I am going to deny that motion.

It certainly was not displayed in the moving papers at the time motion for disqualification was filed.

In any event, as I recall the motion, the only thing I could have ruled on would have been as to me, and then it could have gone to another judge and in theory could have gone through every single judge. But there might have been one judge that would not have recused himself.

So there is no point in going back through the whole thing. There is a procedure to excuse all the judges but that isn't what happened.

MR. ROSEN: If I could point out to your Honor, however, this was not a motion to recuse any judge for prejudice.

THE COURT: I know that.

MR. ROSEN: We didn't feel any prejudice existing. It was just we wanted a judge from another district actually.

THE COURT: I understand that. It just got away from me by letters being directed to Judge Roettger, so here is where we are.

MR. COLE: Your Honor, if I may for the record, the motion that was filed to recuse the district was basically based on the fact that they anticipated testimony from judges and that they felt that no judge in the district would be able to fairly rule when one of their fellow judges from

the bench was testifying. That was the basis that the motion was on.

MR. BLACK: Well, Your Honor, I think it's a little bit more than that because of the allegations. We didn't know, by the way, about these allegations that have been made by Freedman. If we had known about that, of course, we would have brought that up.

That was not brought up and now comes at the trial here, but I think that's what is causing the concern for us, because we don't know what the jury is thinking. They say here Judge King goes out every day to lunch with Judge Aronovitz during that trial.

How do we know what the jurors are thinking now because Your Honor is a member of the same district –

THE COURT: I wonder, myself, what they think. It is not too salutory (sic).

Of course, they may not believe a thing Mr. Freedman says.

Let's bring in the jury.

PET.APP. 14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-0130-Cr-NESBITT

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	*AFFIDAVIT OF*
v.	:	*JACK SHELDON*
LEO GREENFIELD,	:	*STEVENS*
	:	
Defendant.	:	

STATE OF FLORIDA)
) ss
County of Dade)

BEFORE ME, the undersigned authority, personally appeared JACK SHELDON STEVENS who, first being duly sworn, deposes and says:

1. I am an optician and the owner of the Village Opticians located at 9068 Biscayne Boulevard, Miami Shores, Florida 33138.

2. I attended the trial of United States of America vs. Leo Greenfield earlier this year.

3. During the trial, I believed that I recognized one of the jurors as a patient of mine. Within a few days after the verdict, I found out from an associate at the optical shop that this juror's name was Nathan Ramos.

4. I contacted Mr. Ramos to ask him about the verdict. I took this action entirely on my own volition and

not as an agent of Mr. Greenfield or any of his counsel or associates.

5. Mr. Ramos had no reluctance to speak with me about the jury proceedings and the verdict. He spoke freely and related the following facts to me:

a. Mr. Ramos served as a juror on the jury which convicted Mr. Greenfield.

b. The jurors were all hopelessly deadlocked when they left for lunch on Thursday, April 19, 1990.

c. After the jurors returned from lunch, one of the jurors said he had found a typewritten letter or document and it was a piece of evidence.

d. The jurors examined this document. It contained a list of dates, the amounts of checks, and the supposed dates of the meetings between prosecution witness Irvin Freedman and defendant Leo Greenfield. The amounts listed on this item added up to the total amount that the prosecution said was the amount supposed to be given to bribe the judge.

e. Prior to this item being found by one of the jurors, there was no way that the jurors could make the case add up. But once the jurors holding out for Mr. Greenfield reviewed this item, they said it then added up and they found him guilty.

f. Prior to arriving at their deadlock on Wednesday afternoon April 18, 1990, the jurors carefully examined each item of evidence submitted to them for their consideration during deliberations and this particular document was not found in the exhibits.

g. The first time this particular document was received by the jury, to his knowledge, was when one of the jurors brought it to the attention of the other jurors after lunch on April 19, 1990.

h. After this document was presented and discussed by the jurors, they reached their verdicts of guilty. It was this document that tied the prosecution's case together.

i. It was not the tapes that convicted Leo Greenfield, because the tapes were full of Mr. Freedman doing most of the talking.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Jack Sheldon Stevens
JACK SHELDON STEVENS

Subscribed and sworn to before me
this 9th day of July, 1990.

/s/ Sharon H. Baucom
Notary Public-State of Florida

My commission expires:

[SEAL]

PET.APP. 15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-0130-Cr-NESBITT

UNITED STATES OF AMERICA,	:
Plaintiff,	:
v.	:
LEO GREENFIELD,	:
Defendant.	:

MOTION FOR LEAVE TO
INTERVIEW JURORS

Defendant, LEO GREENFIELD, respectfully moves this Court pursuant to Local General Rule 16.E. for leave of defense counsel to interview the following jurors to determine whether their verdict is subject to legal challenge:

Mario Cancio

Carlos Cerball

Ruth Cross

Logan Harris

Claire Harvey

Bettie Hickson

Washington Hines

Linda Hoffman

Nathan Ramos

Diane Raynor

Aida Rodriguez

Sydney Yospe

In the event the Court does not grant the above request and allow defense counsel leave to interview the jurors pursuant to Local Rule 16.E., then Defendant moves the Court to declare unconstitutional that portion of Local Rule 16.E. which prohibits lawyers, after the jury has been discharged, from communicating with a juror on any subject without a prior Order from the Court licensing the communication.

Defendant further moves for an evidentiary hearing to be held after the jurors have been interviewed by defense counsel.*

In support of his motion, Defendant Greenfield states as follows:

1. We have good cause to believe that extraneous prejudicial information was brought to the attention of the jurors during their deliberations in this case. The operative facts are set forth in the "Affidavit of Jack Sheldon Stevens" and the "Affidavit of E. David Rosen," documents that are attached as Exhibits A and B, respectively, to Defendant's pending "Motion for a New Trial on Grounds of Newly Discovered Evidence that Extraneous Prejudicial Information Infected the Verdict." Defendant

---

* In addition to the instant motion, Defendant has filed a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure seeking a new trial on grounds of newly discovered evidence that extraneous prejudicial information infected the jury's deliberations in this case.

hereby incorporates those affidavits, by reference, into the present motion.

2. These facts convince defense counsel that the jury's verdict herein may be subject to legal challenge. The affidavits indicate that the jurors were improperly exposed to a document that was not introduced into evidence; that the document was prejudicial in nature (purporting to verify the prosecution's contentions); and that the document was interjected into the deliberations at a critical time (after the jurors had announced they were deadlocked). Further, the advent of such a document in the jury room – a document never subjected to the adversary process – suggests that some outside influence may have been brought to bear on the jury. Finally, these circumstances rebut any presumptions of regularity and impartiality that may attach to a petit jury's verdict in the usual case.

3. For all of these reasons, defense counsel wish to interview the jurors. They need to document all legal grounds for challenging the verdict, and they need to prepare for any evidentiary hearings the Court may convene.

4. Local General Rule 16.E. empowers the Court "for good cause shown" to allow defense counsel to interview jurors to determine whether their verdict is subject to legal challenge. We submit that the circumstances in the present case amount to "good cause" for allowing this investigation.

5. In many jurisdictions, it is common for counsel to interview discharged jurors, and this practice does not injure the administration of justice. To the contrary, it

improves the quality of advocacy and helps ensure that the jury system is functioning properly.

6. In the present case, if interviews are authorized, defense counsel will restrict their questions to determining whether the verdict may be subject to legal challenge and will use caution to avoid embarrassment to any juror and to avoid influencing the jurors' actions in any subsequent jury service. We will proceed politely, considerately and with deference to the personal feelings of the jurors. We will respect the desire of any juror not to discuss his or her jury service and will not falsely imply that the Court has imposed any obligation upon the juror to speak with us.

7. If the Court agrees that defense counsel have shown good cause for the Court to allow such interviews, then we request a hearing at which we can be heard concerning the terms of the Order to be issued under Local General Rule 16.E.

8. If the Court decides that we have not shown good cause for the requested interviews or that Local Rule 16.E. otherwise precludes the interviews, then we ask the Court to declare unconstitutional that portion of the Rule which prohibits lawyers, after the jury has been discharged, from communicating with a juror on any subject without a prior Order from the Court licensing the communication.

9. Briefly, communications between a juror and a lawyer about jury service are a part of free speech guaranteed by the First Amendment to the United States Constitution. Further, when the lawyer seeks to bring to the attention of the Court the juror's knowledge of error

in the jury's verdict, the lawyer's activity is protected by the first amendment right to petition for a redress of grievances. When the lawyer acts on behalf of an accused person, the lawyer's endeavor is further safeguarded by the rights of the accused. The accused enjoys first amendment rights to free speech and to petition for a redress of grievances, of course. But the accused also has a first amendment right to associate with counsel for purposes of perfecting his or her access to the courts. Indeed, this right to the assistance of defense counsel is specifically conferred upon accused persons by the Sixth Amendment to our Constitution. For this reason and because accused persons are brought involuntarily into our court system as defendants facing the might of the Sovereign, in criminal cases the Bill of Rights should afford the greatest protection for counsel's efforts to discover failures of the jury system and to petition the Court to remedy these failures.

10. Local General Rule 16.E. requires counsel to apply for a Court Order before communicating with a discharged juror on any subject. This requirement amounts to licensing free speech, a form of prior restraint on expressive activity that can result in the censorship of information which ought to be heard by the public as well as by the court system itself.

11. Local General Rule 16.E. also suffers the vice of vagueness. It declares that the Court "may" ease the restraint upon lawyers wishing to interview jurors but does not provide any standards to guide this exercise of discretion.

12. Further, the rule singles out lawyers and curtails their rights while leaving all others free to communicate with jurors. This invidious discrimination against lawyers violates the First Amendment and also the Fifth Amendment Due Process clause, which guarantees Equal Protection of the Laws. Certainly with respect to lawyers appearing in a criminal case to represent an accused person, the Rule does not amount to a reasonable regulation of lawyers as officers of the Court. The criminal defense lawyer appears as the advocate chosen by the accused to protect his or her interests, and, as pointed out earlier, the accused is an involuntary litigant with a special status in our courts.

13. No compelling governmental interest justifies a prohibition which bans lawyers from speaking with discharged jurors. Any justifications asserted on behalf of Rule 16.E. must be subjected to strict scrutiny. For example, preserving secrecy of juror deliberations cannot be counted as an overwhelming justification. The Rule itself leaves jurors free to talk about the deliberations, and it leaves journalists and everyone else under the sun, except lawyers, free to ask about them. Furthermore, Rule 606(b) of the Federal Rules of Evidence makes jurors competent to testify about extraneous prejudicial information or outside influence impinging upon the deliberations. Thus, it seems anomalous to prevent lawyers from asking about these things.

14. In reality, permitting lawyers to communicate with discharged jurors does not pose any clear and present danger to the administration of justice.

15. Moreover, prior restraint on expressive activity is not the least drastic remedy available. There are less restrictive means by which to prevent abuses of juror interviewing by lawyers. To begin with, discharged jurors can protect their own privacy by simply declining to be interviewed. Lawyers can be disciplined or even prosecuted for contempt if they ask questions or make comments that tend to harass or embarrass a juror or to influence the actions of the juror in future jury service. Lawyers can a]so be disciplined for filing frivolous motions. And, such motions can be denied. But meritorious motions should be encouraged and improper jury decisions should be exposed. That is what Freedom and Democracy are all about. That is why we have courts.

16. In conclusion, the facts before the Court in this case present "good cause" for allowing defense counsel to interview the jurors. Indeed, these facts present the very sort of instance for which the "good cause" provision of the Local General Rule was written. If under these circumstances the Rule does not allow defense counsel to interview willing jurors, then the Rule must be declared unconstitutional.

Respectfully submitted,

/s/ Roy E. Black, dw
ROY E. BLACK
Fla. Bar No. 126088
Attorney for Defendant
LEO GREENFIELD
Black & Furci, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

/s/ E. David Rosen, Illegible
E. DAVID ROSEN
Fla. Bar No. 068316
Attorney for Defendant
LEO GREENFIELD
Rosen Law Offices
100 North Biscayne
Boulevard
Suite 2910 New World Tower
Miami, Florida 33132-2305
(305) 377-3737

OF COUNSEL:

/s/ Joseph Beeler dw
JOSEPH BEELER
Fla. Bar No. 130990
Joseph Beeler, P.A.
300 Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 576-3050

PET.APP. 16

Extract from hearing of
July 27, 1990:

> MR. BEELER: We would urge the Court simply for the record to pass upon the Constitutional issue.
>
> THE COURT: I decline to under the status of this case.

PET.APP. 17

Excerpts from Order of August 10, 1990:

ORDER ON POST-TRIAL MOTIONS

. . . .

> (1) & (2) The may 29th motions, for the most part, raise issues already fully addressed by the Court during the course of pretrial proceedings and trial. For the reasons stated both during these proceedings and at the hearing held on July 27, 1990, Defendant's May 29th motion for new trial and motion for judgment of acquittal are DENIED.
>
> (3) For the reasons stated at the July 27th hearing, Defendant's motion for recusal is DENIED.
>
> (4) For the reasons set forth below, Defendant's motion for new trial on grounds of newly discovered evidence is DENIED without an evidentiary hearing.

. . . .

(5) . . . Defendant's motion to interview jurors is DENIED.

PET.APP. 18

6. **Ethical Consideration 7-29, Model Code of Professional Responsibility of the American Bar Association.**

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with a case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a veniremen or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

PET.APP. 19

5. **Disciplinary Rule 7-108(D), Model Code of Professional Responsibility of the American Bar Association.**

DR7-108 Communication with or Investigations of Jurors.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

PET.APP. 20

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA
POST OFFICE BOX 010590
MIAMI, FLORIDA 33101

KENNETH L. RYSKAMP
DISTRICT JUDGE

July 30, 1991

Joseph Beeler, Esq.
Joseph Beeler, P.A.
300 Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137

Dear Mr. Beeler:

I have reviewed your letter of July 25, 1991 regarding Local Rule 16.E. I have attempted to find some minutes or notes regarding the adoption of this rule. I regret to report that there are no records which can shed any light on the adoption of this rule, nor am I aware of any commentary, favorable or otherwise. The local rules committee does not propose any change to the rule. If you have any input on this matter, we would appreciate hearing from you.

Cordially,

/s/ Kenneth L. Ryskamp
Kenneth L. Ryskamp
UNITED STATES
DISTRICT JUDGE

KLR:amn

PET.APP. 21

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